

BOBBY ACHEMIRE
Claimant

OLSTEN TEMPORARY SERVICES
Respondent

CIGNA

KANSAS WORKERS COMPENSATION FUND

ORDER

ON the 2nd day of June, 1994, the claimant's application for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge John D. Clark on May 3, 1994, came on for oral argument in Wichita, Kansas.

APPEARANCES

The claimant appeared by and through his attorney, Steven R. Wilson, of Wichita, Kansas. The respondent and insurance carrier appeared by and through their attorney, Robert G. Martin, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Eric R. Yost, of Wichita, Kansas. There were no other appearances.

RECORD

The record consists of the documents of record filed with the Division of Workers Compensation in this docketed matter including the transcript of preliminary hearing before Administrative Law Judge John D. Clark dated May 3, 1994, and the exhibits attached thereto.

ISSUES

- (1) Whether the Administrative Law Judge exceeded his jurisdiction in denying temporary total benefits for the period of March 29, 1994, through April 27, 1994.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds:

(1) The Administrative Law Judge did not exceed his jurisdiction in denying temporary benefits for the period March 29, 1994, through April 27, 1994.

In this emotionally-contested matter, the parties attended a Benefit Review Conference on March 15, 1994. As a result of this conference a Benefit Review Conference Report was issued by Benefit Review Officer Gregory E. Skinner, listing resolved issues and disputed issues per K.S.A. 44-5,114(c).

The "resolved issues" included an agreement that the respondent would offer a list of three orthopedic specialists from which claimant may choose for care and treatment. Respondent agreed to pay temporary total compensation for two weeks beginning February 8, 1994. Both provisions of the Benefit Review Conference Report were complied with by the respondent.

The disputed issues listed in the Benefit Review Conference Report included the payment of temporary total disability during the time period after the two weeks of temporary total disability compensation agreed to in the resolved issues section, with respondent's counsel agreeing to recommend payment of compensation at least until the authorized physician has given an opinion regarding whether the claimant is temporarily totally disabled.

In his letter of March 15, 1994, to the claimant's attorney, Mr. Robert G. Martin, attorney for the respondent and insurance company, provided a list of three orthopedic surgeons, i.e., Dr. George Lucas, Mr. Mark Melhorn, and Dr. John Rempel, with the addition of Dr. John Toohey as a possible fourth choice should the first three be unacceptable. Claimant was paid temporary benefits from February 8, 1994, through March 28, 1994.

In the March 15, 1994, letter Mr. Martin further added that he would voluntarily provide temporary total benefits to the claimant commencing from February 7, 1994, to the present, and up to the time the treating physician determined claimant had reached maximum medical improvement.

On March 29, 1994, the temporary total benefits were stopped apparently in reliance upon the March 24, 1994, report of Dr. Mark Melhorn which indicated claimant was capable of returning to work in an accommodated position with certain restrictions.

The issue now before the Appeals Board is whether the claimant may enforce the March 15, 1994, letter of respondent's attorney promising temporary total benefits until claimant reached maximum medical improvement. Claimant alleges that Dr. Melhorn's March 24, 1994, return of claimant to light duty would not comprise maximum medical improvement.

K.S.A. 44-5,111(a) states in part:

"Upon receipt of an application for a preliminary hearing pursuant to K.S.A. 44-534a and amendments thereto, or on the written request of any party to a disputed workers compensation claim, the director of workers

compensation may require the parties to meet in a benefit review conference to attempt to reach agreement on disputed issues involved in the claim.

(b) A benefit review conference shall be a nonadversarial, informal dispute resolution proceeding designed to:

(1) Explain, orally and in writing, the rights of the respective parties to a workers compensation claim and the procedures necessary to protect those rights;

(2) discuss the facts of the claim, review available information in order to evaluate the claim, and to delineate the disputed issues; and

(3) mediate and resolve disputed issues by mutual agreement of the parties in accordance with this act and the policies of the director."

K.S.A. 44-5,114(a) states:

"A dispute regarding a claim for benefits under the workers compensation act may be resolved either in whole or in part by agreement at the benefit review conference. If the benefit review conference results in the resolution of some of the disputed issues by mutual agreement or in a complete settlement of the claim, the benefit review officer shall reduce the agreement or settlement to writing. **The benefit review officer and each party or designated representative of the party shall sign the agreement or settlement...."**

(c) If the dispute is not entirely resolved at the benefit review conference, the benefit review officer shall prepare a written report that details each issue that is not settled at the conference. The report shall also include:

(1) A statement of each issue resolved;

(2) a detailed statement of each issue raised but not resolved;

(3) a statement of what, if any, interlocutory orders were entered pursuant to sections (d) or (e); and

(4) a statement of the procedures required to request a preliminary or full hearing and a complete explanation of the differences in those proceedings and the rights of the parties to a subsequent review of the determinations made in these proceedings." (Emphasis added.)

A review of the record indicates the appropriate procedures were followed in that the Benefit Review Order specifically set out the resolved issues and the disputed issues resulting from the Benefit Review Conference.

Claimant's attorney attempts to incorporate respondent's letter of March 15, 1994, as part of the Benefit Review Conference Report. This is not statutorily proper as the letter of the respondent's attorney was not made a part of said report. The resulting dispute indicates there was not a meeting of the minds between the parties at the Benefit Review Conference regarding future period of temporary total disability compensation.

Subsequent to the Benefit Review Conference the parties attended a preliminary hearing before Administrative Law Judge John D. Clark. As a result of that hearing, Administrative Law Judge Clark denied benefits for the period of March 29, 1994, through April 27, 1994. This time gap was not covered by the agreement listed in the Benefit Review Conference Report. While it appears to have been addressed in Mr. Martin's letter, as was indicated earlier, this letter is not a part of the Benefit Review Conference Report.

K.S.A. 44-534(a)(2) grants the Administrative Law Judge the power to make a preliminary finding of medical compensation and/or temporary total disability compensation pending the conclusion of a full hearing on a claim. K.S.A. 44-551 restricts the Appeals

Board's power to review Administrative Law Judges' decisions to situations it is alleged that the Administrative Law Judge exceeded the Administrative Law Judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. K.S.A. 44-551(b)(2)(A).

The Administrative Law Judge is granted specific authority to adjudge issues of temporary total disability compensation at preliminary hearing. The Appeals Board is only granted the limited review of preliminary hearings in certain statutorily listed instances. The Administrative Law Judge did not exceed his jurisdiction in denying the temporary total benefits from the period March 29, 1994, through April 27, 1994 and the Appeals Board does not have jurisdiction to entertain an appeal of the preliminary hearing dealing with this specific issue.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated May 3, 1994, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of June, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Steven R. Wilson, 1861 N Rock Road, Suite 320, Wichita, Kansas 67206
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John D. Clark, Administrative Law Judge
George Gomez, Director